IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 18801

On Appeal from the District Court for the
District of Alaska at Fairbanks

BRIEF FOR APPELLEE

- - - - - - -

WARREN C. COLVER,
United States Attorney,

H. RUSSELL HOLLAND,
Assistant United States Attorney
Anchorage, Alaska

ATTORNEYS FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 18801

On Appeal from the District Court for the
District of Alaska at Fairbanks

BRIEF FOR APPELLEE

- - - - - - -

WARREN C. COLVER,
United States Attorney,

H. RUSSELL HOLLAND,
Assistant United States Attorney
Anchorage, Alaska

ATTORNEYS FOR APPELLEE

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

OTHER

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. BURGE, Appellant,	)	
vs.	)	No. 18801
UNITED STATES OF AMERICA, Appellee.	)	

On Appeal from the District Court for the
District of Alaska at Fairbanks

BRIEF FOR APPELLEE

- - - - -

JURISDICTIONAL STATEMENT

On November 4, 1960, appellant was idicted by a Grand Jury and said indictment was filed in the Federal District Court for the District of Alaska (record 1). Appellant was charged in two counts with violation of 21 U.S.C. 174. He was tried and found innocent on the first count. Appellant was found guilty of the second count and a judgement and committment was entered March 25, 1963 (Record 104). Appellant filed his notice of appeal pursuant to Rule 37, F.R. Crim. P. as authorized by 28 U.S.C. 1291, 1924 (Record 104).

APPELLEE'S STATEMENT OF FACTS

Appellee is in general agreement with the facts as stated by appellant,

though not with some interpretations contained therein. Nonetheless, details of some of the transactions described in appellant's Statement of Facts must be added.

The principal factual question with which this Court is presented involves the search by police officers of the dwelling of Mrs. Dolores Jean Wright (Appellant's Brief 13). When the Government offered its Exhibits C and D, counsel for appellant for the first time objected to these on the ground that they were seized in an illegal search of Mrs. Wright's dwelling (tr. 86). The Judge, in his discrection, heard evidence as to the search and found the search proper (Tr. 128). The Court again considered the question of the legality of this search on motion for judgement of acquittal and, in ruling in favor of the Government on this point, filed its Memorandum Opinion which is part of the Record herein (Record 85 - 96).

The evidence before the trial court with respect to the search of Mrs. Wright's dwelling and admissibility of Exhibits C and D which were seized in that search was as follows:

Appellant and the police informant, Hazel Geary, were arrested in the Idle Hour Cafe in Fairbanks at approximately 7:30 P.M., April 23, 1959 (Tr. 104, 106). Mrs. Dolores Jean Wright was arrested at approximately 8:30 P.M. (Tr. 110 to 111) and was brought to the Federal Building in Fairbanks (Tr. 112).

At approximately 9:45 police officers interviewed Mrs. Wright in the deputy's room of the Federal Building (Tr. 104, 106 to 107, 109). Present

were Officer McQueen, Deputy United States Marshal McRoberts, Assistant United States Attorney Yeager, and Mrs. Wright (Tr. 103 to 104, 107). Mrs. Wright was "asked for permission to conduct a search of her home on 17th Street". (Tr. 103). Officer McQueen testified "She gave verbal permission and we asked if she would sign a waiver of search for us and she said 'you don't need that, you've got my permission.'" (Tr. 103). He further testified that Mrs. Wright appeared to consider the matter a serious one, not a joke (Tr. 103). Deputy McRoberts likewise testified "The verbal permission was given at approximately ten o'clock." (Tr. 110, See also Tr. 113).

While the trial judge declined to belive Mrs. Wright's testimony with respect to whether or not consent for a search was verbally given (Record 88), it is perhaps worthy of note that in the last analysis her testimony was that she did not recall consenting to a search of her dwelling on April 23, 1959 (Tr. 97).

Officer Calhoon, who was in actual charge of the case (although under the supervision of Captain Trafton), was informed by radio at 10:30 P.M. that Mrs Wright had given verbal consent to search (Tr. 116) and the search was instituted at 10:05 P.M. (Tr. 116 to 117). Officers Barkley and McQueen likewise testified that Mrs. Wright's dwelling was searched only after she had verbally consented to a search (Tr. 90, 106, 119). Mrs. Wright further affirmed her consent, though again verbally, after the search at approximately 11 P.M. (Tr 116

It is admitted that the police acted solely upon Mrs. Wright's consent in searching her dwelling. They had neither a search warrant nor consent from appellant (Tr. 89). However, at the time of the search no one was present

in the dwelling (Tr. 89, 132) and officers were not aware that appellant had been living in the dwelling (Tr. 91). The items seized in this search, Exhibits C and D, were found in the bathroom of the premises (Tr. 91 to 92), not in the bedroom which appellant had apparently occupied as Mrs. Wright's house guest (Tr. 98. See also Tr. 93 and 297).

There is no suggestion whatsoever in the record of the hearing on motion to suppress Exhibits C and D either in Mrs. Wright's or the officers' testimony to suggest that Mrs. Wright's consent to the search of her dwelling was induced by duress or coercion, express or implied (Tr. 93 to 101), and the trial judge so found in his Memorandum Opinion (Record 89). Perhaps the most striking evidence of the nature of Mrs. Wright's consent is the fact that it was given so readily. As indicated, Mrs. Wright was first interviewed at 9:45 (Tr. 104, 106 to 107, 109). Permission was granted by 10 P.M. (Tr. 110). No doubt much time was consumed in an attempt to convince Mrs. Wright that written consent was desirable (Tr. 103).

Appellant also questions the search of the automobile used by him in transporting Mrs. Wright, Mrs. Geary, and himself from Mrs. Wright's dwelling to the Idle Hour Cafe where he and Mrs. Geary were arrested (Tr. 4, Appellant's Brief 20).

Immediately after his arrest appellant was informed that his car was being impounded (Tr. 7). Such action was taken because the car had been used to transport narcotics (Tr. 226) which officers received from Mrs. Geary at the time of her arrest (Tr. 32, 33). With respect to such illegal

use of appellant's automobile Mrs. Geary testified at trial to having observed the preparation of the narcotics in question by appellant and her receipt of the same (Tr. 27). She further testified that she, Mrs. Wright, and appellant left Mrs. Wright's dwelling in appellant's car and that just prior to thier departure appellant said "You don't want to be out there with that stuff on you." (Tr. 30). In addition, these three persons were observed leaving Mrs. Wright's dwelling by police (Tr. 146, See also 219). On arrival at the Idle Hour Cafe Mrs. Geary called the police, told them of having the narcotics, and was thereafter arrested with appellant (Tr. 31).

Subsequent to appellant's arrest, the car was impounded and taken to Territorial Police Headquarters (Tr. 220, 235). Later, Treasury Agents placed the car in storage (Tr. 221). On April 30, some seven days after the arrest herein, officers searched the impounded car and located therein the marked money given to Mrs. Geary to purchase narcotics (Tr. 235, 236).

SUMMARY OF ARGUMENT

Appellant claims standing to question the search in which Exhibits C and D, a bottle of milk sugar, a hypodermic needle, and a medicine dropper were seized. Appellee contends that appellant lacks standing to question the search in which said exhibits were seized because he was not present at the time of search. Appellant was merely a house guest in the searched premises and as such was bound by the consent for a search given by the occupant of the premises, Mrs. Wright. Appellant also lacks standing to

question the search because he did not allege ownership or right to possession of the items seized. The former are the usual grounds necessary to establish standing to question a search. Appellant is not within the exception made where narcotics was seized in which case an allegation of possession or ownership would admit the crime.

Even if appellant does have standing to question the seizure of Exhibits C and D, he must on appeal demonstrate that the trial court was clearly erroneous in ruling that the search was founded upon validly given consent. The trial court herein found that valid oral consent for the questioned search was given, and appellant has failed to demonstrate wherein this finding was mistak

Police were not required to obtain the consent of appellant prior to searching Mrs. Wright's dwelling. An invitor may authorize a search of her premises, including those areas occupied by an invitee. Appellant was merely a house guest in Mrs. Wright's dwelling and as such was bound by the consent for a search given by Mrs. Wright.

The search of appellant's automobile was not illegal although conducted several days after the arrest of appellant. By reason of its use to transport narcotics, appellant forefeited his car to the Government. While appellant ma have standing to question the search of forfeited property, such forfeiture deprived appellant of his right of privacy as to the car and, therefore, a search without a warrant was not unreasonable.

The exclusion of Exhibit D and cautionary instruction given to the jury cured any error caused by its temporary admission. In any event,

appellant now seeks to question the admission of Exhibit D on a ground not raised at trial. Such may not be done.

Instructions 9, 10, 12, and 13 were all appropriate to this case, were in fact necessary and correct statements of the law. They are not in the least misleading when, as must be done, all of the Court's instructions to the jury are read together. Instruction 21 did not single out appellant's testimony improperly. Again, this instruction must be read with other instructions given. When this is done it is clear that appellant was fairly treated.

The verdict of guilty herein was supported by evidence. The jury obviously believed Mrs. Geary's testimony which was that appellant possessed narcotics and that appellant facilitated that transportation thereof. Not believing appellant's explanations as to the circumstances herein, they were intitled to convict appellant.

ARGUMENT

I. ADMISSION OF APPELLEE'S EXHIBITS "C" AND "D" WAS NOT ERROR.

A. STANDING OF APPELLANT TO QUESTION THE SEARCH OF MRS. WRIGHT'S DWELLING.

As pointed out in appellee's statement of the facts, appellant was a house guest (Tr. 98) in the dwelling at 774 17th Street in Fairbanks (Tr. 93). This dwelling was under the "control and possession" of Mrs. Wright

even according to her own testimony (Tr. 98, See also Tr. 132, 297). A bottle of milk sugar, an eye dropper, and a syringe needle which constituted Exhibits C and D, were taken from the bathroom of Mrs. Wright's dwelling (Tr. 91-92) and were introduced against the appellant. Neither at the hearing on motion to suppress Exhibits C and D nor at any other time did appellant assert ownership or right to possession of the items seized (Tr. 298-301).

On these facts appellant asserted that he has standing to question the legality of the search of the premises where he resided for several days while in Fairbanks in April of 1959 (Appellant's Brief, page 17). It is appellee's contention that the cases relied upon by appellant do not support this contention.

The primary and most authoritative case on this point seems to be Jones v. United States, 362 U.S. 257 (1960). The basic premise in all cases such as this is that

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." Jones v. United States, 362 U.S. 257, 261 (1960).

To have "standing" to question a search one must meet one of two criteria discussed by the United States Supreme Court: (1) right of possession or ownership in the thing seized, or (2) an interest in the searched premises. As to the first the Supreme Court held in Jones that in narcotics

cases where possession alone makes out the crime, the accused need not allege possession or ownership of the narcotics. The fact that the seized narcotics are offered as evidence against the accused supplies standing to question the search. As to the second basis for standing to question a search, the Court ruled that the presence at the time of the search of the accused as a guest in the searched premises also gave him standing.

It is readily apparent that our case is within neither of these possible bases for standing to question of search. Appellant did not assert ownership or right to possession of the items making up Exhibits C and D, nor did these exhibits consist of narcotics so as to place appellant within the exception which gives standing where the allegation of possession to establish standing to question a search would admit the crime. In short, possession of milk sugar, an eye dropper, or a syringe does not constitute a crime.

While it is true that appellant was a house guest in the searched premises, he was not present therein at the time of the search (Tr. 89, 288). Thus a search herein was in no way "directed" at appellant; and, as the Court in the Jones case pointed out as above quoted, it is inconsequential that the Government made use of evidence gathered in a search directed against someone other than appellant.

The other cases on which appellant relies are likewise distinguishable. In United States v. Jeffers, 342 U.S. 48 (1951), the accused was a guest of occupants of a hotel room which was searched. He was not present at

the time of the search. However, in this case the accused specifically claimed ownership of the narcotics which were seized from the hotel room. On this latter point the Supreme Court found that defendant had property rights in the narcotics sufficient to warrant their suppression, the search clearly having been illegal. As indicated, appellant herein made no such claim to the items which constitute Exhibits C and D.

In McDonald v. United States, 335 U.S. 451, 458 (1948), the accused was found to have standing to an objection to an illegal entry into the building in question since he was a tenant thereof. The tenant was found to have a "constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entering." Clearly our case involves no such circumstances, there having been a consent to entry and appellant having been merely a house guest of the person giving consent to the search (Tr. 103, 110, 98).

In the Contreras case, 291 F. 2d 63 (9th Cir. 1961), this Court reversed a conviction based upon narcotics seized from a car in which the defendants were passengers. This Court found that there was "standing" to question the search solely because the charge was possession of narcotics. In the Plazola case, 291 F. 2d 56, 61 (9th Cir. 1961), this Court ruled "that this arrest without a warrant was without probable cause, and was illegal, and the evidence obtained thereby was not admissible and should have been suppressed." Also, the Court ruled that the accused had standing to question the search under the rule of Jones v. United States since the narcotics

the time of the search. However, in this case the accused specifically claimed ownership of the narcotics which were seized from the hotel room. On this latter point the Supreme Court found that defendant had property rights in the narcotics sufficient to warrant their suppression, the search clearly having been illegal. As indicated, appellant herein made no such claim to the items which constitute Exhibits C and D.

In McDonald v. United States, 335 U.S. 451, 458 (1948), the accused was found to have standing to an objection to an illegal entry into the building in question since he was a tenant thereof. The tenant was found to have a "constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entering." Clearly our case involves no such circumstances, there having been a consent to entry and appellant having been merely a house guest of the person giving consent to the search (Tr. 103, 110, 98).

In the Contreras case, 291 F. 2d 63 (9th Cir. 1961), this Court reversed a conviction based upon narcotics seized from a car in which the defendants were passengers. This Court found that there was "standing" to question the search solely because the charge was possession of narcotics. In the Plazola case, 291 F. 2d 56, 61 (9th Cir. 1961), this Court ruled "that this arrest without a warrant was without probable cause, and was illegal, and the evidence obtained thereby was not admissible and should have been suppressed." Also, the Court ruled that the accused had standing to question the search under the rule of Jones v. United States since the narcotics

seized were introduced against the defendant. Thus both the Contreras and Plazola cases are to be distinguished from our case where no quantity of narcotics was seized in the search sought to be questioned and because appellant was not present at the time of the search (Tr. 91, 92, 89).

In support of appellee's contention that appellant has no standing to question the search in which Exhibits C and D seized, the Court is referred Ramirez v. United States, 294 F. 2d 277, (9th Cir. 1961). In this case in an opinion by District Judge Ross this Court found that the appellant had no standing to question the search of his wife's pocketbook or the seizure of money therein when said money was not claimed by the accused although admitted as evidence against him.

In the Ramirez case a narcotics agent had dealt with the accused and his wife, making purchases of narcotics with money the serial numbers of which had been recorded. At the subsequent arrest of appellant and his wife money was seen in the wife's pocketbook which both she and the accused claimed was the wife's money. Presumably the money seen in the wife's purse turned out to be Government funds used to purchase narcotics. On these facts this Court held that Ramiraz had no standing to question the the search, which was apparently conducted in his presence, although the money was admitted as evidence against him. The Court laid special emphasis upon the fact that "both appellant and his wife have asserted that the seized money belonged to the wife, not the appellant." 294 F. 2d at 281. The Court then cited numerous cases in support of the proposition which

the Supreme Court recognized as the general rule in Jones v. United States "that in order to suppress evidence the movant must at least claim he owned the seized property, that he had a proprietary or possession interest in it or that it 'belonged' to him 294 F. 2d at 281. In this case, as in that presently before this Court, the evidence sought to be suppressed was not an item the possession of which is illegal. Therefore, under the rule of the Jones case and that expressed by this Court, one must allege ownership or right to possession to have standing to seek the suppression of evidence such as Exhibits C and D herein.

As for the second ground under which standing to question a search may be made out, namely permissive or other legal presence in the searched premises, the Court is referred to the case of United States v. Coots, 196 F. Supp. 775, (D.C.E.D. Tenn. 1961). In this case the defendants were accused of illegal possession of a sawed-off rifle which they sought to suppress as evidence. The gun was seized from the home of the defendant Earl Coots. Harold Coots, a kinsman of Earl, was held not entitled to suppress the evidence, possession of which he apparently admitted. The case of Jones v. United States was distinquished since Harold was not a guest, invitee, or resident, etc., in the searched premises.

Admittedly this case is not on all fours with our case. In our case appellant had been a guest or invitee in the searched premises. However, as in the Coots case and unlike the Jones case, appellant herein was not a guest or invitee in the searched premises at the time of the search. At

best appellant expected to be permitted to return to Mrs. Wright's dwelling. Thus it appears that the search herein was really directed at Mrs. Wright, though no doubt with a purpose of gathering evidence against appellant. Nonetheless, except where possession alone of the item seized constitutes a crime, or where defendant is present in the searched premises at the time of the search, it would appear that the accused must, under the above cases, show ownership or possession rights in the item seized or the searched premises. Appellant herein has done neither.

In making the foregoing argument as to Exhibit D, appellee has not overlooked the fact that "a trace of morphine or heroin was in the specimen". (Tr. 167) The fact that we are dealing with items not themselves subject to forfeiture as contraband rather than a cache of some narcotics

distinquishes these items from the evidence seized in the Jeffers case, 342 U.S. 48 (1951). Further, we here deal with only a "trace" of narcotics which might have been either morphine or heroin. The charge herein was limited to heroin (Record 1).

Nonetheless, if a trace of some narcotics gives standing to question a search without the usual allegations as to either possession or ownership of the item or premises searched, what has been said applies to Exhibit C which contained no narcotics and Exhibit D will be further dealt with in Part III, infra.

B. EVEN IF APPELLANT MAY RAISE A QUESTION AS TO THE SEARCH OF MRS. WRIGHT'S DWELLING, HE HAS NOT DEMONSTRATED THAT THE TRIAL COURT WAS "CLEARLY ERRONEOUS" IN RULING EXHIBITS "C" AND "D" TO BE ADMISSIBLE.

In United States v. Page, 302 F. 2d 81, (9th Cir. 1962), this Court, sitting en banc to review a situation markedly similar to that herein, ruled that it would consider only the evidence which the trial judge found credible on motion to suppress, that the question of whether a search has violated the accused's constitutional rights is one of fact, that consent to a search can be validly given although the defendant is in custody, this too being a question of fact, and that "in reviewing the trial court's determination, we apply the 'clearly erroneous' rule, by analogy to Rule 52(a) F.R. Civ. P., 28 USC, as elucidated in United States v. United States Gypsom Co., 1947, 333 U.S. 346 . . .!" In amplifying the Court's earlier opinion in Channel v. United States, 285 F. 2d 217, (9th Cir.

1960), this Court reaffirmed the rule that the Government must convince the trier of fact that consent to a search was given without express or implied duress or coercion, that the consent was unequivocal and specific, given freely and intelligently, and that such must be shown by convincing evidence.

From the memorandum opinion filed by the trial court herein it is immediately apparent that it decided the question of legality of the search herein under the test set out in the Channel and Page cases (Record 88-89). In this memorandum opinion the trial court reviewed in some detail its appraisal of the motives, demeanor, etc., of the five witnesses who testified on motion to suppress Exhibits C and D. The Court had concluded that the testimony of Mrs. Wright was not worthy of belief. From the credible evidence before it the Court found that Mrs. Wright was not coerced, that she was specifically asked for permission to search, that she "fairly, intelligently, unequivocally and specifically" gave such consent within fifteen minutes after her arrival at the Federal Jail (Record 88). The Court further found that no search had been conducted prior to the giving of consent for a search (Record 89). In addition, the Court noted that nothing in Mrs. Wright's testimony suggested "that the verbal consent given by her was induced or prompted by any duress or coercion, actual or implied, real or imaginary." (Record 89).

The foregoing findings by the trial court appear to be amply borne out in the transcript herein as set forth in appellant's statement of the

facts. Appellant has totally failed to show wherein the trial court committed clear error--wherein "a mistake has been committed, United States v United States Gypsum Co., 333 U.S. 364, 395, (1947), in finding that Mrs. Wright, although under arrest, validly consented to search of her dwelling. If Mrs. Wright was intimidated as appellant claims she would undoubtedly have signed the written consent which police sought. (Tr 103).

C. CONSENT OF APPELLANT TO SEARCH OF MRS. WRIGHT'S DWELLING IS NOT REQUIRED.

As appellant points out, it is admitted that officers did not ask for appellant's consent before searching Mrs. Wright's dwelling and that they did not have a search warrant (Tr. 89). It should, however, be noted that Mrs. Wright testified that she was in possession and control of the dwelling in question (Tr. 98) and that police officers did not know that appellant had occupied a room in Mrs. Wright's dwelling (Tr. 91). Appellant was merely a house guest of Mrs. Wright (Tr. 98). However, neither he nor anyone else was in the dwelling in question when it was entered pursuant to Mrs. Wright's consent to a search (Tr. 89, 132).

Appellant's contention that his consent to a search of Mrs. Wright's dwelling was necessary is not borne out by the cases cited by him. In Chapman v. United States, 365 U.S. 610 (1961), a forced entry and search on the say-so of the landlord of the searched premises was struck down. The tenant of the dwelling was not present and had not been

consulted. These facts differ considerably from our case where entry was gained with the consent of the person immediately entitled to control and possession of the entire house which was subjected to search. Unlike the Chapman case appellant herein was not the person entitled to exclusive possession of the premises. Unlike the landlord in the Chapman case Mrs. Wright, who consented to the search, was entitled to immediate and exclusive possession of the premises. The cases of Cola v. United States, 22 F. 2d 742 (9th Cir. 1927), and Klee v. United States, 53 F. 2d 58 (9th Cir. 1931), are distinguishable from our case in the same fashion as the Chapman case, as also may be the case of United States v. Blok, 188 F. 2d 1019 (D.C. Cir. 1951). In all of the latter cases the person entitled to exclusive possession of the searched premises had not consented to the search conducted in their absence without a warrant. Hanzel v. United States, 296 F. 2d 650 (5th Cir. 1961), involves the right of the sole owner of a corporation to object to the seizure of corporate records. Here again consent of no one entitled to use or possession of the searched premises was obtained prior to the search. In our case Mrs. Wright was consulted and did consent to the search of her dwelling (Tr. 103, 110).

While it is true that Stein v. United States, 166 F. 2d 851 (9th Cir.)cert denied, 334 U.S. 844 (1948) and United States v. Sferas, 210 F. 2d 69 (7th Cir.) cert. denied 347 U.S. 935 (1954) are distinguishable on their exact facts from the instant case, they embody a general principle which

fits the facts herein. These cases, unlike those relied upon by appellant, embody the factor of consent by one having a right to immediate and exclusive possession of the searched premises.

In the Stein case the person consenting to a challenged search was the wife of the accused who with his wife had joint ownership and control of the searched premises. This Court held that the evidence seized was admissible against the accused, the entry and search by officers having been properly authorized by the wife. Certainly if a wife can consent to a search of a joint premises, an invitor, such as Mrs. Wright, can consent to a search of her premises as against an invitee such as appellant. The Sferas case involved consent by one of two business partners to a search and seizure. The Court held that consent by one partner was sufficient, Again, if one partner can consent to a search of partnership property, an invitor can consent to a search of his permises, including areas to which an invitee has access.

A search of premises occupied by a house guest has been upheld in Fredrickson v. United States, 266 F. 2d 463 (D.C. Cir. 1959), and Woodward v. United States, 254 F. 2d 312 (D.C. Cir), cert. denied 357 U.S. 930 (1958). In these cases consent was given by the owner or possessor of searched premises. See Cutting v. United States, 169 F. 2d 951, 12 Alaska 143 (9th Cir. 1948). Also instructive is the case of United States v. Eldridge, 302 F. 2d 463 (4th Cir. 1962). While this case affirms the search of a car consented to by the bailee of the car

under the challenge of the bailor (somewhat the reverse of our situation where the one ultimately entitled to possession gave the consent). it points up the distinction between cases such as those on which appellee relies and the case of Chapman v. United States, 365 U.S. 610 (1961), on which appellant relies. Also, the Court in the Eldridge case emphasizes the fact that the ultimate test here is whether or not the search was a reasonable one. If a bailee's consent to a search is reasonable, how much more so is that consent given by one entitled to exclusive possession of a dwelling as against a mere house guest.

II. SEARCH OF A FOREFEITED AUTOMOBILE IS NOT UNREASONABLE SO AS TO RENDER MONEY FOUND THEREIN INADMISSIBLE. APPELLANT HAS NOT BEEN PREJUDICED THEREBY IN ANY EVENT.

It is clear that the search in question was made several days after the car was seized by reason of its having been forfeited (Tr. 10, 13, 235.) Appellant does not question the forfeiture of his car by reason of its having been used in transporting narcotics but rather he objects that no search warrant was obtained prior to the search of the previously forfeited car (Appellant's Brief 20, et seg.).

Presumably appellant bases his standing to question this search on the lanquage of United States v. Jeffers, 342 U.S. 48 (1951). In that case the United States Supreme Court ruled that one could have standing to question a search although he had no property in the thing seized which was later introduced as evidence against him. It must be remembered,

however, that standing to question a search and whether the search conducted was reasonable are two different considerations. The Jeffers case so treated these questions.

In attempting to establish the invalidity of the search herein appellant cites three cases. In the Rent case, 209, F 2d 893 (5th Cir. 1954), the car in question was not seized for having transported contraband but for the purpose of searching it. The car was not seized for forfeiture until after the search which turned up marijuana in the car.

Our case is quite different. Officers told appellant that his car was being impounded (Tr. 7). It was impounded "because it had been used in the sale and possession of narcotics" (Tr. 226). The basis for the forfeiture was, of course, officers receipt of narcotics from Mrs. Geary after her arrest (Tr. 32, 33), which narcotics had been received from appellant (Tr. 27) who then used the car in question to transport Mrs. Geary with narcotics from Mrs. Wright's dwelling on 17th Street to the Idle Hour Cafe where she and appellant were arrested (Tr. 30 to 31). Just prior to the arrest, officers had observed appellant, Mrs. Wright and Mrs. Geary leave Mrs. Wright's dwelling, get into appellant's car, drive to a beauty parlor where Mrs. Wright got out, and then drive to the Idle Hour Cafe where the arrest was made (Tr. 146). Based on the foregoing, and in particular on the testimony of Mrs. Geary, the car in question was forfeited by appellant at the time of its use for transportation of illegal narcotics, although the seizure for such illegal use

took place somewhat later. 49 U.S.C. 781, 782, 787 (d), United States v. One 1951 Oldsmobile Sedan, 129 F. Supp. 321 (D.C. E.D. Penn. 1955). Thus, at the time that the car in question was searched, appellant had no property in it. While as indicated in United States v. Jeffers, 342 U.S. 48 (1951), the loss of property may not remove the former owner's standing to question a search, it is difficult to see how a search of the property forfeited could be unreasonable. Unlike the Jeffers case there is no illegal entry or use of evidence obtained through an illegal entry in our case. It is, of course, only unreasonable searches that are prohibited. United States v. Rabinowitz, 339 U.S. 56, 60, 70 (1950).

In neither of the other cases relied upon by appellant does it appear that the car in question had been forfeited before the search. In the Stoffey case, 279 F. 2d 924 (7th Cir. 1960), officers, though armed with search warrants as to the accused and the building, had no search warrant for the accused's car which was searched and from which evidence of illegal gambling was taken. The car had not been forfeited prior to the search and apparently was not subject to forfeiture so that the accused retained his full right of privacy as to the car which appellant herein had already lost by reason of his having used the car to transport narcotics. (Tr. 30)

Nonetheless, if appellant's car was illegally searched, the fruits thereof bore no relationship to appellant's guilt of Count II of the indictment herein. Count II dealt only with concealment and facilitation of the transportation of narcotics (Record 1). The money found in appellant's

car after its forfeiture was pertinent only to the sale of narcotics. As to this charge appellant was acquitted (Record 104). Appellant does not suggest, as indeed he probably could not, wherein the admission of the money relative to Count I was prejudicial to him as to Count II.

III EXHIBIT "D" WAS NOT OBJECTED TO ON THE GROUND NOW RAISED AND WAS NOT PREJUDICIAL TO APPEALLANT.

The Government's Exhibit D was admitted into evidence over the objection of the defendant's counsel (Tr. 168). Counsel's objection was merely "The same objection, Your Honor," "Tr. 168), which appears to refer to counsel's objection to all the Government's exhibits, including Exhibit A where counsel objected as follows:

> I object at this time, Your Honor. I don't think the chain is quite complete yet. Maybe I am incorrect in that regard. It appears to be complete from Lt. Trafton to this witness and from this witness back to the office, but I am not quite satisfied that it has been completely covered yet.

Counsel for the Government replied:

> I recall the testimony of Officer Barkley that he recieved the Identification from the Bureau in the course of Business. I can call Officer Barkley back, or Lt. Trafton. (Tr. 163)

Thereafter the Court agreed with the United States Attorney that the evidence had been accounted for at all times between its seizure and the trial, and appellant's objection was overruled (Tr. 163). Appellant made no objection on the ground now asserted, namely, "No evidence was offered to link this exhibit with the defendant or with the crime charged," (Appellant's Brief 23). Appellant may not rely upon an

objection not presented to the trial court. Hilliard v. United States, 121 F. 2d 992, 995-96 (4th Cir.), cert. denied 314 U.S. 627 (1941); Rule 51, F.R. Crim. P.

Nonetheless, Exhibit D was later excluded and the jury instructed to disregard any testimony concerning it (Tr. 326, 327). The very cases upon which appellant relies are ample authority for the proposition "that, as a general rule, evidence which is withdrawn from the consideration of the jury by the direction of the trial judge may not serve as a basis for reversible error, that the direction of exclusion by the court cures any error which may have been committed in its introduction." Helton v. United States, 221 F. 2d 338, 340-341 (5th Cir. 1955): Throckmorton v. Holt, 180 U.S. 552, (1901).

In the Helton case the conviction was reversed because the appellate court was convinced that no instruction could remove the effect of a statement attribued to the accused by a witness to the effect that the accused had been smoking marijuana for four or five years. Acquisition and production of marijuana being the charge. The trial court had stricken the statement from the record but apparently gave no cautionary instruction. The testimony, of course, had no bearing on the offense charged and was in the nature of an admission by the defendant. The Throckmorton case is likewise distinquishable from our case due to the nature of the evidence temporarily admitted and deficiencies in the technique by which the trial court accomplished the removal of improper

evidence.

The eye dropper and hypodermic needle admitted and later stricken in our case with cautionary instruction are clearly not in the same class as the evidence stricken from the Helton case. Exhibit D was relevant to the charge herein but may, in fact, have been stricken on the ground on which appellant now relies, namely failure to show a connection between the items in Exhibit D and the accused. That this temporary admission as evidence suggested appellant's knowledge of some illegal narcotics activity may be true; but as to this, the excluded evidence suggested activity no different than that testified to in great detail by Mrs. Geary, which testimony the jury obviously believed.

In short, the Court's exclusion and instruction gave appellant exactly what he sought, and the evidence temporarily admitted was not of the inflammatory character of that in the Helton case. Gregory v. United States, 253 F. 2d 104, 110 (5th Cir. 1958).

IV. INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE NOT UNRELATED TO THE ISSUES OR EVIDENCE, NOR WERE THEY CONFUSING.

A. INSTRUCTION 9.

Appellant's exception to Instruction 9 was noted and is question as being beyond the evidence herein. (Appellant's Brief, 27). As indicated in the trial court's Memorandum Opinion (Record 91) this instruction was taken verbatum from Instruction 24.07, Jury Instructions and Forms, 27 F.R.D. 39, 167.

As for the instruction being beyond the evidence herein, Mrs. Geary testified that the heroin which appellant had in his possession was in an "ordinary" white jar like that comprizing Exhibit C which contained milk sugar (Tr. 27). The heroin which appellant removed from one white jar and which was given by him to Mrs. Geary was likewise placed in an unstamped container (Tr. 27).

There seem to be few, if any, cases in point on the definition of concealment as used in 21 U.S.C. 174. However, the case of United States v. One Cadillac Automobile, 2 F. 2d 886 (D.C. W.D. Tenn. 1924), suggests that dealing with unstamped narcotics in a car amounts to concealment. The trial court in Instruction 9 charged that dealing in unstamped narcotics amounted to a concealment. Roviaro v. United States, 353 U.S. 53, 63, (1957), suggests the strong relevancy between possession and concealment in cases such as this. Hence, the necessity of an instruction narcotics tax stamp law, 26 U.S.C. 4704 (a).

B. INSTRUCTION 10.

Instruction 10 is likewise challenged as being beyond the evidence herein. This instruction was also taken verbatum from Instruction 24.09, Jury Instructions and Forms, 27 F.R.D. 39, 169, This instruction was expressly approved in Arellanes v. United States, 302 F. 2d 603, 608 (9th Cir.) cert. denied 371 U.S. 930 (1962).

As for the applicability of this instruction under the facts of the case, appellant himself elicited much testimony as to the presence of persons

other than appellant at the dwelling of Mrs. Wright on the afternoon in question (Tr. 139-140, 143). In particular, the finger of suspicion was pointed at appellant's friend and business associate in whose company appellant was much of the afternoon of April 23, 1959 (Tr. 139-140, 144). The former was a known dope peddler (Tr. 50). Finally, from Mrs. Geary's testimony it seems possible that the narcotics were in fact stored in Mrs. Wright's basement (Tr. 26). See Arellanes v. United States, 302 F. 2d at 606, wherein this Court discussed the effect of a person's presence or control over premises where narcotics are found. On the foregoing facts, detailed instructions as to what constituted possession of narcotics by the appellant were clearly in order. The relationship and importance of a finding of actual or constructive possession of narcotics to a charge such as that herein was set forth in the immediately preceeding portion of this brief.

C. INSTRUCTIONS 12 AND 13.

Rather surprisingly, appellant argues that the instructions given on intent and what evidence constitutes a showing of intent were inappropriate because "there was no issue as to intent, and if the testimony offered by the Government was believed, intent was apparent." (Appellant's Brief, page 27). By the very words of the statute under which defendant was charged, it is apparent that knowledge (intent) is an essential element of the crime charged which the Government must prove. 21 U.S.C. 174. In Griego v. United States, 298 F. 2d 845, 848 (10th Cir. 1962), the

elements of this offense are set forth and include "(3) The defendant's knowledge of such unlawful importation." But moreover general criminal intent is required and as to this an instruction such as that here questioned must be given. Shafer v. United States, 179 F 2d 929 (9th Cir) cert. denied, 339 U.S. 979 (1950).

Instructions 12 and 13 were taken from Instructions 4.01, 4.02, 4.03 and 4.06, Jury Instructions and Forms, 27 F.R.D. 39 (75-79). Each of the latter instructions is supported by voluminous authorities cited therein.

Finally, as appears in the trial court's Memorandum of Opinion, (Record 93-94), the objection leveled by appellant's counsel at instructions 9, 10, 12 and 13 was that these instructions while not wrong or erroneous, may have a tendency, because they are unnecessary, might have a tendency to mislead the jury." We submit that the instructions given were indeed not erroneous, that they were necessary, and that when considered by the jury as a whole with other instructions as required by the Court in its first instruction they were in no way misleading. As to the second portion of appellants attack on the foregoing instructions (Appellant's Brief, 28 et seq.) unless appellee misunderstands the argument, there is pointed up no error in the instructions. Appellant states that no prima facie case is made out by the Government without the testimony of Mrs. Geary (Appellant's Brief, 29). Appellant does not suggest nor does he cite any authority to show why the validity of

the instructions or strength of appellant's case herein should be considered without reference to Mrs. Geary's testimony.

If appellant's argument is that Instruction 9 in conjunction with Instruction 12 suggests that a conviction may be had herein for failure to produce tax stamps for containers used for narcotics, such argument plainly overlooks both the Court's first instruction to the jury that all instructions be considered as a whole and the law to the same effect. Stapleton v. United States, 260 F. 2d 415, 420 (9th Cir. 1958). Also overlooked is the obvious and express purpose of instruction 9; namely, the defining of "conceal" as used in 21 U.S.C. 174.

The trial court clearly instructed the jury as to the exact charge herein (Instruction 4), and statute upon which the charge is based (Instruction 5), and the effect of unexplained possession of narcotics (Instruction 6). The Court then spelled out the elements of the crime (Instruction 7). Instruction 9 then defines concealment. When all of these instructions are considered together it is clear that the jury must find proof of the three elements of the crime herein as set forth in Instruction 7 and that these must be proved by the Government beyond a reasonable doubt. It is clear also that the Court did not instruct the jury that they might convict solely on the basis of appellant's failure to have tax stamps on a narcotics container.

Appellant argues that failure to convict on Count I negates appellant's possession of narcotics (Appellant's Brief, 30). This is simply not so for

Count I suggests that the jury had a doubt as to who made the sale, but not appellant's unexplained possession, concealment, and transportation of narcotics.

V. INSTRUCTION 21 WAS NOT ERRONEOUSLY GIVEN.

Appellant objects to Instruction 21 because this is a "close case", because it singles out defendant's testimony (Appellant's Brief 32), and becau "the decision of the jury rested almost completely on the testimony of two adverse witnesses." (Appellant's Brief 34). Appellant does recognize that this instruction has had wide acceptance. In fact it was taken with but slight modification (which changed the words "should be seriously considered" to "may be considered") from Stapleton v. United States, 260 F. 2d 415, 420 (9th Cir. 1958). As indicated in that case, the instruction "follows closely the rules laid down in Reagan v. United States, 157 U.S. 301, 310 (1895).

Contrary to appellant's suggestion, he was not the only witness whose testimony was singled out for special consideration. In Instruction 22 the Court warned the jury that Mrs. Geary was an accomplice and that her testimony "is to be received with caution and weighed with great care." In addition, the Court instructed the jury generally as follows:

> All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care.

As the Court instructed in Instruction No. 1 and as this Court ruled in t Stapleton case, 260 F. 2d 415, 420 (9th Cir. 1958), instructions are not to

be singled out but must be treated as a body.

VI. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILTY ON COUNT II.

Without citation of authority or reference to the transcript appellant seeks to have this Court overturn a quilty verdict. Indeed, a verdict unsupported by substantial evidence as to the elements of the crime should not stand. Noah v. United States, 304 F. 2d 317 (9th Cir. 1962).

The elements of the crime of which appellant was convicted are: (1) concealing and ficilitating the transportation of narcotics, (2) doing so knowingly, and (3) doing so with knowledge of illegal importation. 21 U.S. C 174, Griego v. United States, 298 Fed. 845, 848 (10th Cir. 1962). As indicated previously, unexplained possession of narcotics is "deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 21 U.S. C. 174.

In this case, Mrs. Geary testified in vivid detail as to her receipt from appellant of one capsule of heroin (Tr. 20-21) and his later preparation of a quantity of heroin (Tr 26-27), delivery of it to her (Tr. 27), and transportation of her and the appellant in the latter's car to the place of arrest (Tr. 30-31). Supporting Mrs. Geary's testimony as to defendant's possession of heroin is Exhibit A, a medicine dropper, and syringe needle. Analysis of the items making up Exhibit A disclosed

traces of morphine or heroin (Tr. 161-163). Also in evidence was the pillbox into which Mrs. Geary put the heroin which she received from appellant April 23, 1959 (Tr. 164-165). Upon analysis the substance therein proved to be milk sugar, quinine, hydrochloride, and heroin hydrochloride (Tr. 164). It was Exhibit B which Mrs. Geary had in her possession while being transported by appellant and which she turned over to police upon her arrest (Tr. 30-32). Finally, Exhibit C was admitted. This was a jar of milk sugar on which was found a fingerprint of appellant (Tr. 165-166, 180).

In the face of the foregoing, appellant offered no explanation of the circumstances indicating his possession of narcotics (Tr. 270-287, 297-301). He was satisfied with attempting to raise doubt through showing the presence of other persons who might have been the true culprit, rather than showing that someone else, not he, gave Mrs. Geary the narcotics in question and that he transported them without knowing it. (tr. 50, 59, 139-140, 143, 280, 281). In this situation the jury had to chose whether to belive appellant or Mrs. Geary. The jury obviously believed Mrs. Geary and thereby found that appellant has possession of narcotics and that he had not sufficiently explained his possession of the same. Having failed to explain his possession of narcotics, appellant could be convicted of concealing and facilitating the transportation of narcotics. 21 U.S. C. 174.

CONCLUSION

The search herein conducted was validly consented to, making admission of Exhibit C proper. Exhibit E was properly seized from a previously forfeited car and was hence proper evidence, although it is irrelevant and nonprejudicial to appellant as to Count II. The Court properly instructed the jury and properly denied a motion for judgement of acquittal. Therefore, the judgement herein should be affirmed.

Dated, Anchorage, Alaska,

October_____, 1963.

Respectfully submitted,

WARREN C. COLVER
United States Attorney

By_____
H. RUSSELL HOLLAND
Assistant United States Attorney

ATTORNEYS FOR APPELEE

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN C. COLVER
United States Attorney

By _____
H. Russel Holland
Assistant United States Attorney